

Funk, Lothar

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Lothar Funk

## A Legally Binding EU Charter of Fundamental Rights?

*The Charter of Fundamental Rights of the European Union is based, on the one hand, on the traditional concept that fundamental rights are a means to protect citizens against unjustified interference by public authorities. On the other hand, by contrast to the general defensive approach of negative rights, and more controversially, some chapters guarantee quite extensive positive rights to protection and entitlements, based on equality and solidarity. The following article offers an economic analysis of the efficiency and legitimacy of the Charter, including the question of whether it should be binding at a supranational level.*

At the intergovernmental conference in Nice in December 2000 it became clear that previously vague ideas about the finality of the integration process require more exact definition. However, the debate on the future of Europe, and particularly the division of labour between the European, national and regional levels, has been dominated by two extreme alternatives. Minimalist nation-statists favour a reduction of political integration and its replacement by an extended free trade zone. Maximalist federalists, on the other hand, push for "ever closer union" and a federation of European states supported by a constitutional agreement with clearly defined jurisdictions and democratic legitimation and monitoring in a "union of peoples" (not a "union of states").<sup>1</sup>

In this article these issues and further alternatives are addressed through an economic analysis of the EU Charter of Fundamental Rights. Although the "solemn proclamation" of the Charter took place at Nice, its origins and drafting were quite separate from the "Amsterdam leftovers" Intergovernmental Conference. The German presidency of the Union in 1999 initiated the Charter by calling for an EU bill of rights. It was prepared by an extraordinary Convention made up of 62 representatives of national governments and parliaments, the Commission and the European Parliament.

The Member States were divided in their views as to what character the Charter should have. The firm opposition of the British government and the reservations of the Irish, the Dutch and the Scandinavian Member States meant that the Charter was not given legally binding status, despite the arguments of the

French, Germans and Italians. Even beyond this issue of its legal status, the character of the Charter is complex and contestable:

"The question of what we should do with the Charter depends significantly on what we think the Charter is currently, what we think it is for, and the legitimacy of the drafting process. In many significant respects we do not really know what it is. There are significant differences of opinion as to what it is for. And there are very different views as to the legitimacy of the process of drafting. We are, therefore, ... in a state of considerable uncertainty about the implications of the Charter as currently drafted, and lacking a consensus on its democratic legitimacy."<sup>2</sup>

### Contents of the Charter of Fundamental Rights

The 54-clause Charter is divided into seven chapters: on dignity, freedoms, equality, solidarity, citizenship, justice, and general provisions. On the one hand, the Charter is based on the traditional concept that fundamental rights are a means to protect citizens against unjustified interference by public authorities. On the other hand, by contrast to the general defensive approach of negative rights, and more controversially, some chapters guarantee quite extensive positive rights to protection and entitlements, based on equality and solidarity. Legal analysis demonstrates several obvious weaknesses of interpretation and unanswered questions in the drafting of the solidarity rights:

<sup>1</sup> J. Janning: A Europe without borders. Policies of managing change 2001, International Bertelsmann Forum, Gütersloh 2001, Bertelsmann, pp. 6-8.

<sup>2</sup> C. McCrudden: The Future of the EU Charter of Fundamental Rights, New York University School of Law Jean Monnet Working Paper 10/01, New York 2001, p. 10.

\*This paper was written while the author was DAAD Senior Fellow and Director of Economic Research at the Institute for German Studies, University of Birmingham, UK.

"In particular, to what extent does the Charter accord the provisions included in the part headed 'Solidarity' the status of rights at all? Several of the provisions in the Solidarity section of the Charter are subject to heavy qualification and are often dependent on how each Member state has legislated in the area. More confusingly, the Charter refers to a distinction between 'rights' and 'principles' but does not indicate on its face which provisions fall into which category. Some have interpreted the distinction as implying that the solidarity-type rights qualify only as 'principles' and would thus not be justiciable in a future, legally enforceable Charter. Others disagree, viewing the rights as currently drafted to be fully justiciable ... A key question for the future, therefore, is what we should do about this uncertainty. Do we leave this to judicial determination on the basis of the existing text, or do we envisage some further language giving greater guidance on the issue?"<sup>3</sup>

#### The European Social Model

The role of economic analysis of the Charter is to concentrate on a general analysis of the efficiency and legitimacy of such a Charter, including the question of whether it should be binding at a supranational level. At the heart of this debate is whether the Charter can and should fulfil an integrationist function and whether it is important to save the goals of the "European social model". The positive rights to protection and entitlements in particular mirror the European Union's goal of social cohesion, which may refer to the idea of not alienating European workers from the process of integration. Therefore, the debate about the future of the Charter is bound up with the broader debate on the European social model.

Among others, the European Commissioner for Social Affairs, Anna Diamantopoulou talks in a positive sense about the common principles of a European social model which "ensures a healthy balance between economic growth and social cohesion".<sup>4</sup> From this perspective the European social model is not based on economic efficiency alone. It tries to strike a balance between social spending and social protection on the one hand and competitiveness and economic efficiency on the other. Moreover, these two

elements form a triangular relationship with a third, a high employment rate in the context of an increasingly globalised economic system.<sup>5</sup> Facing persistently high EU unemployment, the crucial future task in terms of economic policy according to the Commission of the European Communities will be "modernising the European social model and investing in people ... to retain the European social values of solidarity and justice while improving economic performance".<sup>6</sup> Such an agenda sets out to ensure economic success in terms of employment and economic growth without giving up the common principles of the European social model. These include a rather extensive basic social security cover for all citizens and a relatively egalitarian wage and income distribution compared to the United States.

Several questions immediately arise when thinking about this triangle: What is the appropriate relationship between rights and employment, and between rights and competitiveness, as well as between rights and social policies in general? Are solidarity and equality rights foundational to economic success, or a drag on it? Strong adherents of the idea of a European social model generally support a (legally enforceable) charter of rights. The espousal of equality and solidarity rights can be regarded as a move by those who oppose the development of a more free-market "US model" of economic growth and development. For those who believe that a trade-off between competitiveness and social protection is inevitable, the Charter symbolises a re-balancing of the Community towards social protection and against free market forces. A compromise between these two competing points of view is the hope of the Charter to shape the social character of Europe by establishing minimum standards. The idea of the current declaration is that such an approach protects the competencies of the member states, for on the whole it leads to regulations below the average level.

Often, however, regulations which aim to reduce inequality or to increase efficiency by imposing minimum standards have unwanted side-effects actually resulting in a "tyranny of good intentions": lower efficiency or a rising inequality or both. One example is the possibly very generous mandatory safety expen-

<sup>3</sup> Ibid., p. 16. On the question of whether the Charter has horizontal repercussions binding private companies and citizens, as most of the social rights of the Charter suggest, see T. von Danwitz: The EU Charter of Fundamental Rights, in: *Internationale Politik – Transatlantic Edition*, Vol. 2, No. 2, 2001, pp. 23-27, here p. 26.

<sup>4</sup> A. Diamantopoulou: The European social model: promoting economic and social progress, address to the international conference on achieving balanced economic and social growth, 19 March 2001.

<sup>5</sup> For a graphical description see P. Pochet: The new European Social Agenda 2001-2006, in C. Degryse, P. Pochet (eds.): *Social developments in the European Union*, Brussels 2001, ETUI, pp. 37-51, here p. 41.

<sup>6</sup> Commission of the European Communities: Social Policy Agenda. Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, 28 June 2000, Brussels, p. 6.

ditures resulting from Article 31. This would equalise earnings by removing dangerous jobs, but could cause unemployment. The maximum hours mandate could be another example of a definitely bad policy from an economic perspective. It reduces efficiency because the parties know best what hours suit them, and increases inequality because only unskilled workers will in general have their hours restricted, whereas managerial workers and the self-employed are effectively excluded.<sup>7</sup> Finally, the recently controversially discussed European Commission's draft directive on temporary agency workers demands that agency workers would have the same pay and conditions as an equivalent permanent employee in the user company after six weeks. This is indirectly justified by Commissioner Anna Diamantopoulou with the principle of non-discrimination, which is also part of the Charter: "We cannot agree with the political concept that employers can benefit from the flexibility of staff and at the same time pay them less."<sup>8</sup> Such a proposal is, however, anti-competitive and would most likely destroy jobs beneficial to both employees and employers. It is doubtful whether this kind of legislation should be imposed on members of the European Union and why a legally binding Charter should increase the likelihood of successfully implementing a "one-size-fits-all" legislation when national laws can easily cope with such problems and prevent exploitation. Due to the contrasting views presented and the possible trade-offs of the current and even more of a future legally binding Charter,<sup>9</sup> the question arises: "What would economists put into the Charter of Fundamental Rights?"

#### **Legitimising the Charter: a Constitutional Economics Evaluation**

Two myths prevail concerning the Charter of Fundamental Rights. Federalists normally regard its role as legitimacy-increasing, whereas nation-statists complain that the Charter is a further milestone towards an EU superstate. They may also argue that it diminishes efficiency. However, further options also exist.<sup>10</sup> From a "constitutional economics" perspective it might be appropriate to limit the content of the Charter to classic defensive rights of citizens against the state and

only include social rights to minimum standards if they are acceptable to all countries.

To avoid unwanted economic side-effects, the legitimacy-increasing role of the Charter emphasised by federalists needs to be rather limited. Leaving aside the rhetorical effect, from an economic perspective a binding European Charter of Fundamental Rights would not appear to produce any qualitative leap in legal terms – unless, of course, one were secretly striving for a direct or indirect transfer of the sovereignty still in the hands of the member states to the Union. Such a transfer of sovereignty is currently not to be expected and if it were, the side-effects of implementing inefficient "one-size-fits-all" economic policies at the supranational level would increase rather than reduce the current problems of the European Union.

On the other hand, a Charter of Fundamental Rights is not necessarily a milestone towards an EU superstate as nation-statists contend. The current Charter is probably economically damaging even though it is non-binding, due to the strategy of the Commission. Its pragmatic approach is that "institutions that will have proclaimed the Charter will have committed themselves to respecting it".<sup>11</sup> Even if the Charter is only a political declaration it is likely to have legal effects, as the European Court of Justice will take it into account in its decisions. Past experience suggests that this may pose economic dangers,<sup>12</sup> but they are not as strong as the risks inherent in a legally binding Charter with more ambitious social rights. However, a Charter in which the level of rights represents only a lowest-common-denominator compromise from an economic perspective will be "ineffective" if markets operate efficiently. It would not be marred by unintended economic side-effects at all. Moreover, a Charter can be economically favourable in situations

<sup>7</sup> J.T. Addison, W.S. Siebert: *Regulating European labour markets: more costs than benefits*, London 1999, Institute for Economic Affairs.

<sup>8</sup> Employers attack charter for temps as unworkable, in: *The Guardian*, 21 March 2002.

<sup>9</sup> B. Neuss: *Europe's Constitutional Convention*, in: *Internationale Politik – Transatlantic Edition*, Vol. 3, No. 2, 2002, pp. 13-18, here p. 14.

<sup>10</sup> I shall not discuss, however, the traditional theory of fiscal federalism applied to the question of task allocation between the European Union and the member states. See on this A. Alesina, I. Angeloni, L. Schuknecht: *What does the European Union do?*, Harvard University Working Paper, Boston 2002; and G. Tabellini: *Principles of Policymaking in the European Union: an Economic Perspective*, Bocconi University Working Paper, Milan 2002.

<sup>11</sup> A. Wiener: *The constitutional significance of the charter of fundamental rights*, in: *German Law Journal*, Vol. 2, No. 18, 2001, pp. 1-9, here p. 7.

<sup>12</sup> According to U. Roth and V. Thomas: *Europe on the path to a common social policy*, *Inter Nationes Basis-Info*, No. 34, 2000, p. 13, the European Court of Justice judges "have frequently set social policy signals, most of which have resulted in a strengthening of workers' rights" and "whereas the Court 'has been quite effective in striking down laws of the member states that are anti-competitive they have never ruled against a significant centralising regulation or directive of the council of ministers'". Quoted from N. Barry: *Competitive federalism: the case of the European Union*, Brussels 2001, The Centre for the New Europe, p. 9.

where it leads to an increase in efficiency as well as less inequality.<sup>13</sup>

Therefore, we need to wave farewell to the naive, simplistic points of view prevalent in much of the superficial political debate. What is needed instead, is an evaluation of the reasonable content of such a Charter against the background of deeper issues like the European social model underlying the debate about the future of the Charter. Normative constitutional economics or constitutional political economy is an ideal tool to analyse these questions. "Constitutional economics starts with the assumption that politicians try to maximize their own individual utility – like everybody else".<sup>14</sup> The constitutional level of rule choice is distinguished from the post-constitutional level of strategic choice within rules. This distinction is at the heart of constitutional economics. The Charter of Fundamental Rights concerns rule choice, so constitutional economics appears to be the most appropriate form of analysis for it. In other words, what to include as well as who should be responsible for designing a desirable and therefore legitimate Charter is a problem of choosing the "rules of the game" under which the citizens of a polity may wish to live.

The "European Union's institutions are exercising powers which either were delegated by the governments of the member states or were usurped by the Commission and the European Court of Justice through far-reaching interpretation of Treaty provisions".<sup>15</sup> Therefore, an analysis of the legitimacy of the Charter of Fundamental Rights should rest on its ability to help to close the legitimacy gap of the European Union. In particular, analysis of "output" and "input" legitimacy could discover how legitimate a binding implementation of a Charter would be. Regarding the EU as an appropriate level can be justified for three reasons:<sup>16</sup>

- "Member states agree to formulating a common policy because joint problem-solving provides added value. In terms of policy performance, the EU is, from a systematic point of view, not inferior to domestic policies; the process may be more cumbersome and the compromise agreed upon not as close to the median voter as it may be in a national

setting. Yet, despite this, the policy is expected to be more effective". In other words: "The test of EU action is its capacity to *add value*; where the EU can help tackle problems that would otherwise overcome national governments, and where it can make a constructive contribution, then it should act. Where it cannot add value, it should keep out of the way. This is a stronger version of the subsidiarity thesis: Europe is a political response to globalisation, not another layer of government trying to solve local problems."<sup>17</sup>

- "Despite public debate on the Union's democratic deficit, there is still a widespread belief that the EU is the appropriate level for coping with quite a number of political issues and that – in principle – the institutions are apt to do it."<sup>18</sup>
- The orthodox reading that the EU lacks legitimacy because it neither has a demos nor a European state is outdated. In order to function, an EU with nation states not just as a transitory but as a permanent type of polity, does not need citizens with a predominantly European identity in order to be as legitimate as the state. "This EU polity is both: a compound and a unitary system ... The ('imagined') political community is still the nation. The Union will be based on a 'political society' with national, though 'Europeanised', identities."<sup>19</sup>

Let us start with the assumption that the third proposition is or will be accepted by the current members and the new entrants because otherwise it would not make sense to be an EU member. Traditionally, the EU's legitimacy is mainly based on output legitimacy, in other words on the efficiency and effectiveness of European problem-solving ability. The question then is what kind of Charter can enhance the problem-solving capacity and ability of European governance thereby strengthening the output dimension of Union legitimacy.

Constitutional political economy supplies an important criterion for what should be included in

<sup>13</sup> S. Deakin: Social rights and the market, in: U. Mückenberger (ed.): Manifesto Social Europe, Brussels 2001, ETUI, pp. 17-40, here pp. 33-35.

<sup>14</sup> S. Voigt: What constitution for Europe? The constitutional question from the point of view of (positive) constitutional economics, in: T. Bruha, J.J. Hesse, C. Nowak (eds.): Welche Verfassung für Europa?, Berlin 2001, Springer, pp. 41-61, here p. 49.

<sup>15</sup> M. Höreth: The European Commission's White Paper on Governance: A "Tool-Kit" for closing the legitimacy gap of EU policy-making?, Center for European Integration Studies Discussion Paper 94, Bonn 2001, p. 22.

<sup>16</sup> B. Kohler-Koch: The Commission White Paper and the Improvement of European Governance, New York University School of Law Jean Monnet Working Paper 6/01, New York 2001, pp. 12-13.

<sup>17</sup> D. Miliband: Perspectives on European Integration – A British View, Max Planck Institute for the Studies of Societies Working Paper 02/02, Cologne 2002, p. 2.

<sup>18</sup> B. Kohler-Koch, op. cit., p. 12.

<sup>19</sup> Ibid., p. 13.

such a Charter, which may be seen as a vehicle for constitution-making. Government should have no role in policy choice, other than implementing the (near) unanimously selected alternative from the set of choices. "Those who expect to gain from a policy change must find a way to compensate, and credibly commit to making that compensation, to secure the consent of nearly all the affected parties. It will still be true that the gains to gainers must exceed the losses to losers, but the surplus in gains must be distributed, rather than taken from the losers. The compensation could be in the form of side payments on the issue question, or it could be concessions in another policy area ..."<sup>20</sup>

From an economic point of view the inevitable result of this criterion must be that "policy-makers should strive for minimum standards, but only ones that are acceptable to all countries",<sup>21</sup> i.e. the criterion of unanimity needs to be observed. One important reason why it appears economically optimal to choose the lowest common denominator is simply the still undecided struggle among alternative schools in economic policy matters. Therefore, one has to take into account at least the two main post-war economic approaches. Fundamentally, they are based on two opposite views.

### Regulated Capitalism versus Neoliberalism

The first view is what has been called regulated or managed capitalism. It shows a rather strong bias towards state-led regulation and an "enabling" role of the government, for example as a facilitator of collaboration amongst powerful groups in order to sustain social peace. Whereas adherents of the alternative neoliberal economics school support "one best way" for all economies based on general microeconomic and macroeconomic principles and very limited interference with markets, proponents of the existence of a welfare optimal regulated capitalism refuse to accept the wholesale importation of one model.<sup>22</sup> In terms of macroeconomic policy, they normally support some kind of Keynesian demand management, blaming a tight monetary and fiscal policy for persist-

ently high unemployment in the European Union.<sup>23</sup> The role of, and instruments for, effective microeconomic policy will differ across countries because varieties of capitalism differ, without being obviously superior in the medium term.<sup>24</sup> Corporate governance, labour relations and government institutions interact in highly specific ways and it may be illusory to design "one best way", for example, for the European Union based on benchmarking. Textbook deregulation appears as a dangerous obsession and is most likely welfare decreasing for a coordinated market economy like Germany.<sup>25</sup> This school of thought generally supports social policy at the European level to deal with social dumping or unfair competition problems. According to John T. Addison "the basic point of the argument is this: if member states do have different policies, effective coordination to prevent a race to the bottom cannot be left to the market, and some form of pan-European regulation setting minimum standards is necessary. Absent this, so the argument runs, bad policies will simply drive out good ones."<sup>26</sup>

Neoliberalism has been the mainstream economic position for at least 25 years. It accepts only limited intervention by the state. Fiscal policy should concentrate on allocation, not stabilisation during economic downturns. Monetary policy should keep inflation low rather than being aimed at full employment. Incomes policy has little effect on inflation but can cause micro damage. There is no long-run trade-off between inflation and unemployment. As a result monetary policy can be depoliticised and put in the hands of central bankers. The underlying microeconomic principle is efficiency, not equity. More precisely, most (neoliberal) economists are concerned with Pareto efficiency, which means that no one can be made better off without someone being made worse off. Pareto improvements make at least one individual better off without making anyone worse off. The Pareto principle is the belief that any such improvements should be instituted. However, there are very often others who are adversely affected by such economic policy decisions. Then we need an alternative mechanism to decide upon implementing a certain policy. In cost-benefit analyses and economic policy decisions very often the

<sup>20</sup> M. C. Munger: *Analyzing Policy. Choices, Conflicts and Practices*, New York, London 2000, W.W. Norton, p. 358.

<sup>21</sup> Centre for Economic Policy Research: *Social Europe*, London 2000, p.2.

<sup>22</sup> D. Miliband, *op. cit.*, p. 5.

<sup>23</sup> R. Schobben: "New Governance" in the European Union: A Cross-Disciplinary Comparison, in: *Regional and Federal Studies*, Vol. 10, No. 2, pp. 35-61, here pp. 38-39; D. Soskice, B. Hancké, G. Trumbull, A. Wren: *Wage Bargaining, Labour Markets and Macroeconomic Performance in Germany and the Netherlands*, in: L. Delsen, E. de Jong (eds.): *The German and Dutch Economies. Who Follows Whom?*, Heidelberg 1998, pp. 39-51, here p. 42.

<sup>24</sup> A. Turner: *Just Capital. The Liberal Economy*, London 2001, Macmillan, pp. 107-164.

<sup>25</sup> D. Soskice et al., pp. 50-1; and L. Funk: The "Storm before the Calm" thesis Re-examined, in: J. Leonhard, L. Funk (eds.): *Ten years of German unification: transfer, transformation, incorporation?*, Birmingham 2002, Birmingham University Press, pp. 183-210, here p. 183.

<sup>26</sup> J.T. Addison: Is community social policy beneficial, irrelevant, or harmful to the labour market performance of the European Union?, University of Potsdam Discussion Paper 90, Potsdam 2000, p. 7.

Kaldor-Hicks criterion is used where the gainers and the losers from a policy change need to be identified. Neoliberals usually accept the following rule: if gains to gainers exceed losses to losers, implement the policy change, whether or not gainers actually compensate losers. So laws which set minimum wages or which otherwise establish legally binding wage-floors above the market clearing level need to be changed without necessarily compensating the workers whose wages fall, because the economy will then rise to a higher gross domestic product. This rise results from the increasing demand for labour that allows the less able workers to get access to the labour market.

Furthermore, in this view a case can be made against the supranational coordination of social policies and regulatory frameworks that would result

from a binding Charter of Fundamental Rights including social rights. These rights would lead to higher than market-clearing wage costs, at least in some countries. Even though it can be shown in a game theoretical context that cooperation between agents of economic policy improves overall efficiency, neoliberals see the problem as more complicated:

"Requiring policy coordination blurs the lines of responsibility of policy agents; asking for coordination may allow agents to shift their responsibility to someone else as a scapegoat. Therefore, there should be a clear policy assignment in the sense that the leading responsibilities of the policy agents should be clearly defined."<sup>27</sup>

<sup>27</sup> H. Siebert: The Assignment Problem, in S. K. Berninghaus, M. Bräulke (eds.): Beiträge zur Mikro- und Makroökonomik, Berlin 2001, Springer, pp. 439-448, here p. 444.

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**Figure 1**  
**Opposed Views of Alternative Economic Schools on Reforms in Continental Europe**

Economic Schools Reform in field of	Regulated Capitalism	Neoliberal Economics
Macroeconomic institutions	Urgently required	Basically o.k.
Microeconomic institutions	Basically o.k.	Urgently required

Additionally, empirical research seems to support the notion “that some groups (typically youth and older workers) are adversely impacted by employment protection”.<sup>28</sup> In sum and only slightly sharpened, the neoliberal view on microeconomic and macroeconomic policy is almost the exact opposite of the regulated capitalism position, as Figure 1 shows.

Such strong scientific differences over economic regulatory policy hardly make it possible to find a consensus on a Charter of Fundamental Rights, especially for countries which are very heterogeneous. This makes the result of the Nice summit unsurprising: the Charter as a non-binding solemn proclamation, including many vague articles with a(n almost) “lowest common denominator” character. Taking into account persistent differences in the evaluation of economic policy proposals and the unavoidable package deals at intergovernmental conferences, this result is probably also the best one could expect from a practical constitutional political economy perspective. The present compromise allows a “better-than-nothing” evaluation from adherents to regulated capitalism and a “the-worst-could-be-avoided” statement by the proponents of neoliberalism. Nonetheless, medium-term dangers due to possibly inappropriate directives by the EU Commission and decisions of the Court need to be kept in mind.

Growing public debate on the Union’s democratic deficit apparently makes the EU’s future legitimacy depend increasingly on democratic participation and institutionalised mechanisms to sanction unwanted behaviour. For example, on 23 February 2002 a British daily answered the question “How can we make the EU more democratically accountable?” by arguing “This must mean more power for the directly elected element of the EU’s present constitution, the European Parliament”. But the effectiveness and efficiency

of EU policy is still at least as important for the legitimacy of the European Union as diminishing the democratic deficit. Potentially, the two can conflict:

“There is a natural tendency to judge the democratic credentials of EU institutions against the tried and tested methods of national democracy. Hence talk of the democratic deficit. But what people want above all from the EU is *delivery*; while legitimacy is essential democracy is a bonus; the real source of discontent in Europe today concerns the effectiveness of EU actions. That is why I emphasize the delivery deficit.”<sup>29</sup>

For structural reasons democratic mechanisms cannot cope with the delivery deficit alone. Economists generally recognise that the most important delivery deficit of the European Union is *competitive*, and would also apply to a more democratised European Union of rationally ignorant voters. Such voters have no rational interest in controlling politicians effectively. It would be more costly than beneficial to them individually. This is already a problem at the national level, but it is even more pervasive at the European level, which is much less transparent. As a result, elected politicians have no strong interest in effectively promoting an efficient free market. Its long-run advantages are thinly spread while new regulations and subsidies visibly protect certain groups without hurting others strongly. However, such policies are damaging to the growth and employment of the European economy in the medium and long term. As its effects are asymmetrical, enlargement could make this problem worse: “The benefits are long-term and widely spread, but the costs are more immediate and concentrated on a few sectors and regions. The losers are readily identifiable and vocal, while the gainers are the quiet (and often unknowing) majority.”<sup>30</sup>

It is thus somewhat misleading to argue that the main problem of the European Union is a “democratic deficit” due to too many unelected bodies in

<sup>28</sup> J.T. Addison, op. cit., p. 10.

<sup>29</sup> D. Milliband, op. cit., p. 4. See also C. Patten: Let’s get emotional, in: The Spectator, 18 May 2002, pp. 22-23.

<sup>30</sup> H. Grabbe: Translating Ireland, in: The Wall Street Journal Europe, 4 July 2001, p. 8.



the system. A solution which calls only for "more democracy" is unlikely to solve the delivery problem in a satisfying way.<sup>31</sup>

Nonetheless it is generally true that "output legitimacy has to be supplemented by input legitimacy".<sup>32</sup> From a political science perspective this needs to involve equal and effective participation and institutionalised accountability to ensure reliability, i.e. a commitment to binding agreements on the part of decision-makers. According to the constitutional political economy approach "justice should emerge naturally from a constitutional process".<sup>33</sup> Input legitimacy, therefore, should approach in its ideal form consensual agreement. It should not be discriminatory because participants promote separable interests in society, but should be "constitutional" by effectively advancing the interests of all citizens.

"Thus, ordinary politics deals with the crafting of rules where opposition may be significant, and may change frequently over time, so that the rules themselves must be easily changeable ... Rules determined within the confines of ordinary politics can be changed quite easily."<sup>34</sup>

In other words, if controversy exists over which policy better increases efficiency, then output legitimacy should be part of ordinary politics, i.e. it should normally be majoritarian and non-consensual.

"However, constitutional politics deals with long-lasting rules conceived in the interest of all elements of society so that, ideally, opposition is non-existent."<sup>35</sup>

How can the implementation of long-lasting rules be achieved in practice? The basic idea is that "contractors" should examine rules from behind a "veil of ignorance" or "uncertainty" with regard to their own interests in future periods. This conception aims to prevent particular interests from backing a constitution which favours their own position. Instead it facilitates agreement on rules that define a "social contract" based on a list of permanent or quasi-permanent parameters for social interaction. Such interaction takes place over a whole sequence of periods to achieve optimally the common good for all members of society.

How can such a contractarian proposal best be operationalised to generate an EU Charter of Fundamental Rights? Can it be written in a way that it effectively advances the interests of *all* citizens? Solving the problem of input legitimacy requires the identification of the process and actors by which a Charter could be written as a provisional constitutional treaty (or part of it) for Europe which has desirable consequences from a constitutional political economy perspective. The convention-method is in general a proper way to increase input legitimacy, but the devil is in the details. At least two conditions should be fulfilled:<sup>36</sup>

First, the rules of living together have to be created in a participatory process of discussion, analysis, persuasion and mutual agreement, which we may call a constitutional convention and which is a one-time occurrence.

Secondly, the convention should not include (a majority of) persons whose long-run political careers depend on the result of the convention's decisions, because it would clearly be rational for these persons to write the constitutional rules to maximise their long-term career prospects. Rather, it is important to elect a separate group of people to the constitutional convention. As Mueller has put it:

"... it is better to elect a separate group of people to the constitutional convention than to have the constitutional convention formed by those elected to serve in the parliament. The rational voter realizes that a different set of issues is to be decided at a constitutional convention, and thus that a different type of person should be chosen to participate. Given the one-shot nature of the convention, the voter knows that, once elected, her representative will be free to vote as he pleases at the convention. The citizen wants, therefore, to elect persons noted for their integrity as well as their honesty and judgement – qualities not always found in those who choose politics for a career ... If the constitutional convention is properly constituted, the citizen *knows* that he has been fairly represented. He can observe and consider the arguments on all sides of the issue as it is debated; ... The citizen knows, and presumably accepts, that the original constitution was ratified by a substantial majority and that any changes in it require the same majority..."<sup>37</sup>

The first condition was fulfilled in the process of generating the Charter. But critics of the Charter argue that the Convention (like the later one established in

<sup>31</sup> N. Barry, op. cit., pp. 13-17.

<sup>32</sup> B. Kohler-Koch, op. cit., p. 8.

<sup>33</sup> R. Mudambi, P. Navarra, G. Sobbrío: Constitutional Issues in Modern Democracies, in: R. Mudambi, P. Navarra, G. Sobbrío: Rules and Reason. Perspectives on Constitutional Political Economy, Cambridge 2001, Cambridge University Press, pp. 1-5, here p. 1.

<sup>34</sup> Ibid., pp. 2-3.

<sup>35</sup> Ibid., p. 3.

<sup>36</sup> D.C. Mueller: On Writing a Constitution, in: R. Mudambi et al., op. cit., pp. 9-32, here pp. 23-27; R. Vaubel: Der Hochmut der Institutionen, in: Rheinischer Merkur, 1 March 2002, p. 8.

**Figure 2**  
**Competing Approaches to Increasing the Legitimacy of the European Union**

Approach	Federalist Perspective	Constitutional Economics Perspective
Features		
Goals	Creation of European identity	Output and input legitimacy
Shape of basic rights at the European level	Not too narrow; effective in practice	Minimum standards, but only ones that are acceptable to all countries; ineffective if markets operate efficiently
Main Actors	Commission, Council, Courts	More power to the nations
Problems	Creation or persistence of outsiders because of unintended consequences of interference with market	Approach rather difficult to implement, because powerful vested interest groups undermine it

Laeken on a future constitution) failed the second condition. Roland Vaubel argues that the majority of members of such a Convention should not have a strong interest in a centralised EU state. Too many members of the convention were members of the European Parliament (16), representatives of the EU Commission (1) or representatives of national governments/the European Council (15).<sup>38</sup> A minority of members of the Convention was composed of representatives of national Parliaments (30/62). They meet the test of subsidiarity, being more likely to argue that laws should be passed by the level of government closest to the citizen and that the competencies of the EU should be clearly described and limited.

In sum, the Convention of the Charter ran at least some risk of legitimising and strengthening actually illegitimate power positions because the composition of the membership was not optimal. The less than optimal composition of the Convention from a contractarian perspective also demonstrates that the Charter is used as "part of a symbolic policy that works according to the logic of strategic intervention, i.e. top-down action that seeks to convince the 'other' (citizen) of a given goal. If this strategic intervention is not turned around to a more open-ended approach of discursive interaction which does not only aspire to broaden input but which is also prepared to listen and perhaps adapt previous policy positions accordingly, the constitutional significance of the Charter is likely to produce unintended consequences such as 'fuelling anti-EU-feelings' similar to previous cases of symbolic policymaking in the EU".<sup>39</sup>

Vaubel argues that a legitimate constitutional treaty for Europe (including the Charter) should neither be prepared by an intergovernmental conference nor by a constitutional Convention comprised of representa-

tives of institutions that support a more centralised European Union.<sup>40</sup> Instead a constitutional political economy perspective suggests that an inter-parliamentary conference consisting of members of national parliaments might secure legitimacy. As the national parliaments will decide whether to accept the final constitutional treaty, they should be able to correct the current personnel of the constitutional Convention on the Future of Europe.

Figure 2 summarises the legitimacy analysis. It clarifies fundamental differences between federalist and "constitutional economics" perspectives on the Charter. Both approaches face dilemmas. Whereas the federalist perspective is probably politically viable in the short and medium term, its economic results are not desirable because of the disregard of potential unwanted side-effects. Costly new regulations may improve the situation of some, but create "outsiders" who bear the costs (the opposite rhetoric of proponents of regulation notwithstanding). The constitutional political economy approach could bolster output as well as input legitimacy, but it faces a dilemma of political viability. Its implementation may be problematic as those currently holding power would probably see it reduced in the future. Solutions to current problems of democracy and legitimacy<sup>41</sup> based on simple reforms like strengthening the Commission and Parliament<sup>42</sup> are neither promising nor available.

<sup>37</sup> D.C. Mueller, op. cit., pp. 24 and 26.

<sup>38</sup> R. Vaubel: Der Hochmut der institutionen, op. cit., p. 8; R. Vaubel: Europa-Chauvinismus. Der Hochmut der Institutionen, Munich 2001, Universitas, pp. 126-134 and 190-200.

<sup>39</sup> A. Wiener, op. cit., p. 9.

<sup>40</sup> R. Vaubel, op. cit., p. 8.

<sup>41</sup> K. Hughes: Is this Europe's Philadelphia?, in: Wall Street Journal Europe, 28 February 2002, p. 7.

**Figure 3**  
**Alternative Approaches: Traditional Community versus Intensive Transgovernmentalism**

Approach	Traditional Community	Intensive Transgovernmentalism
Features		
Targets	Ever closer union	Chances for all: present and new members
Methods	Extensive delegation, hard rule-making and common programmes in more and more areas	Soft experimental methods; open method of coordination
Main Actors	Commission, Council, Courts	More power to the nations
Problems	Legitimacy, efficiency and accountability rather low	Diversity rises, but on balance very likely fewer problems

Hence we are likely to have to live with compromises or hope for lucky circumstances. However, one alternative means of (partly) closing the European legitimacy gap may exist, as we shall see.

### Conclusions

Social rights are not always unambiguously positive: they are helpful if they seek to remedy market failures and protect the disadvantaged members of society from the consequences of their economic weaknesses. But sometimes, perversely, social rights protect better-off groups. A legally binding Charter in the European Union is not economically damaging only if it is limited to minimum standards that are acceptable to all countries. The level of rights granted by the Charter should represent only a lowest-common-denominator compromise from an economic perspective. It should give priority to individual liberty rights.<sup>43</sup>

The highly divergent expectations and concepts that various states bring to this project means there is an inherent potential for conflict – not only in the field of social rights in very different economic and institutional environments but also “recent studies on rights policy in the wider Europe have demonstrated that, far from a European convergence in the area of rights policy, divergence is predominant”.<sup>44</sup> The integration process could surely do without the difficulties that would doubtless arise if the Charter were made binding – or worse if it were to fail. From an economic perspective, the opportunity costs of the time used to bargain the final content of such a Charter might be high (distracting attention from (more) important things including the reform of the common agricultural policy). If the purpose of the exercise is more transparency through simplification of the legal framework, it might make

more sense to agree an uncontroversial list of duties and limits of the European Union including fundamental rights.

Softer methods such as the “open coordination” approach – a form of peer pressure and benchmarking – may avoid the problems of the minimalist and maximalist alternatives. This method appears to be tailor-made for a hybrid like the EU, with both federal and intergovernmental features. It based on “intensive transgovernmentalism”<sup>45</sup> and avoids the pitfalls of the traditional one-size-fits-all “Community method”, which appears out of date partly due to enlargement (see Figure 3). In certain areas, like pension and employment policy, “the lack of legitimacy” resulting from the use of the Community method “could blow the Union apart”.<sup>46</sup> The duty to force through EU policies might break governments or lead to violent protests. Especially in important areas touching domestic economic governance and national electoral credibility “a new variant form of policy cooperation may be emerging, which seems to leave the formal locus of political responsibility and legitimacy with the member states. This methodology invents informal instruments and soft tools which have the potential advantages, first, of flexible adaptation that avoids the rigidities of the traditional ‘Community method’ and, second, of a differently constructed version of subsidiarity. If this turned out to be a sustainable methodology, it could also provide a form of ‘incremental constitutionalism’, without the contested bargaining of intergovernmental conferences and attendant national ratification hurdles”.<sup>47</sup>

<sup>42</sup> H.-E. Scharrer: Single market or National Industrial Policies?, in: *Intereconomics*, Vol. 37, No. 2, 2002, pp. 66-67, here p. 66.

<sup>43</sup> The Wall Street Journal Europe: A good constitution, 28 February 2002, p. 6.

<sup>44</sup> A. Wiener, op. cit., p. 7.

<sup>45</sup> H. Wallace: Experiments in European governance, in: M. Jachtenfuchs, M. Knodt (eds.): *Regieren in internationalen Institutionen*, Opladen 2002, Leske and Budrich, pp. 255-269, here p. 255.

<sup>46</sup> F. W. Scharpf: European governance: common concerns vs the challenge of diversity, in: M. Jachtenfuchs, M. Knodt (eds.): *Regieren in internationalen Institutionen*, Opladen 2002, Leske and Budrich, pp. 271-284, here p. 276.

<sup>47</sup> H. Wallace, op. cit., pp. 266-267.